OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 20 March 2001 [1]

Introduction

1. In this case, the Commission of the European Communities requests the Court to declare that, in connection with the administrative and contractual practice introduced by certain public universities, the Italian Republic has failed to fulfil its obligations under Article 48 of the EC Treaty (now, after amendment, Article 39 EC). That practice effectively means that, when certain teachers are appointed, the experience which they have acquired as foreign-language assistants is not recognised, whereas such recognition is guaranteed for all national workers.

2. This case is a result of two earlier Court judgments, in *Allué and Coonan* (hereinafter '*Allué I*') [2] and *Allué and Others* (hereinafter '*Allué II*'). [3]

1 — Original language: Dutch.

2 — Case 33/88 *Allué and Coonan* v *Università degli studi di Venezia* [1989] ECR 1591.

3 — Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Coonan and Others* v *Università degli studi di Venezia* [1993] ECR I-4309.

The national legal framework

3. Following those judgments — and first proceedings brought by the Commission under Article 169 of the EC Treaty (now Article 226 EC) — the Italian Government adopted a law to reform foreign-language teaching at Italian universities.

4. That law of 21 June 1995 (hereinafter 'Law No 236/95') has four main provisions:

(a) the post of foreign-language assistant is abolished and replaced by that of 'associate and mother-tongue linguistic expert' (hereinafter 'linguistic associate');

(b) linguistic associates are now engaged by universities on the basis of a private-law employment contract (and no

longer on the basis of a public-law appointment[4]) usually concluded for an indeterminate period, and, in exceptional circumstances, in order to meet temporary teaching requirements in *certain* foreign languages, for a fixed term;

(c) linguistic associates are engaged following a public selection procedure, the detailed rules of which are laid down by universities according to their respective statutes;

(d) these former foreign-language assistants enjoy a preferential right of employment *and, in addition, they retain rights acquired in the course of previous employment.*

In the context of this dispute, the main relevant provision is Article 4(3) of the law in question, which establishes the principle of the retention of acquired rights (see (d) above). That retention of acquired rights is guaranteed for Italian workers in general by Law No 230 of 1962.

5. However, the autonomy of universities in Italy has the effect that, except as provided by Law No 236/95 and more generally by private employment law, the legal status of linguistic associates is governed by the following agreements: the collective agreement for the university sector, the collective agreement for the university concerned and the individual employment contract between the university and the linguistic associate. The (national) collective agreement for the university sector provides, in Article 51(5), that any individual university's collective agreement may provide for an increase in salary on the basis of the productivity and experience of the associates concerned.

6. Italian universities have adopted a variety of arrangements for the re-engagement of former assistants. A number have converted fixed-term employment contracts into employment contracts of indeterminate duration and have restored the career progression of former assistants. However, the universities of La Basilicate, Milan, Palermo, Pisa and Rome ('La Sapienza') and the Oriental University Institute of Naples have opted for solutions which do not provide for full restoration of career progression for former assistants. The compatibility of those solutions with Community law is at issue in the present case.

4 — A '*contrato di lavoro autonomo*'.

Procedure

7. After the entry into force of Law No 236/95, the Commission received a series of complaints from former foreign-language assistants protesting at discriminatory treatment by Italian universities during the transition to the new regulatory framework (they have since held posts as 'linguistic associates').

8. Following those complaints, on 23 December 1996 the Commission sent the Italian Republic a letter of formal notice under Article 169 of the EC Treaty (now Article 226 EC), in which it put forward two grounds of complaint. The first concerned the non-recognition of acquired rights of assistants by certain Italian universities, the second changes in the legal status of linguistic associates. The Italian Government replied on 12 March 1997. The Commission was not satisfied with the Italian Government's reply and on 16 May 1997 delivered a reasoned opinion. The Italian Government subsequently provided the necessary information, which resulted in a further letter from the Commission on 9 July 1998. In that letter, the Commission reformulated the first ground of complaint and withdrew the second.

9. According to the Commission, it is apparent from the information provided by the Italian Government that no end has been put to the infringement of Article 48 of the EC Treaty, which is described in detail by the Commission in the letter of 9 July 1998. In the case of six of the nine universities mentioned in that letter, the Italian Government has failed to provide the Commission with any documentary evidence to show that the years of service which linguistic associates completed as foreign-language assistants prior to the entry into force of Law No 236/95 are now recognised for the purposes of pay and social security.

10. All those factors led to the delivery of a further reasoned opinion on 28 January 1999, and finally to the present application to the Court. A hearing in this case was held on 11 January 2001.

Arguments of the parties

11. According to the Commission, six public universities apply, in the appointment of linguistic associates, a practice which is not compatible with freedom of movement for workers within the meaning of Article 48 of the EC Treaty. That practice effectively means that the experience gained by linguistic associates as foreign-language assistants prior to the entry into force of Law No 236/95 is not recognised, whereas comparable recognition is guaranteed for all national workers. Article 2 of Law No 230/62 in fact provides that a fixed-

term contract of employment is automatically converted into an employment contract of indeterminate duration *from the date on which the worker was first employed.*

The situation at each university

12. According to the Commission, at the University of La Basilicate, linguistic associates who were formerly assistants and newly-recruited linguistic associates receive the same pay. Even if that pay is higher than the pay provided for in the collective agreement for the university sector, that does not mean that account has been taken of the experience acquired individually by a former assistant, as is certainly required by Article 4(3) of Law No 236/95 and Article 51(5) of the collective agreement for the university sector, which in turn implement Article 48 of the EC Treaty. The Commission further submits that the Italian Government implicitly acknowledged the well-founded nature of the complaint by claiming that a solution to the problem raised by the Commission would be provided by a new collective agreement for the university and the contracts arising from that agreement. The Italian Government counters that submission by maintaining that the linguistic associates receive a level of pay which is considerably higher than the basic pay provided for in Article 51(5) of the collective agreement for the university sector. They thus receive sufficient recognition of their professional experience. Likewise, the Italian Government is of the opinion that the Commission adduces insufficient evidence for its allegations.

13. The collective agreement of the University of Milan contains no provision for acquired rights and makes no distinction based on length of service. Even though, according to a letter from the Italian authorities of 11 December 1998, the university states that it provides for more favourable treatment for former assistants on the basis of experience, that statement is not supported by any documentary evidence. The Ministry of the Universities, in its letter of 23 April 1999, also points out that the University of Milan has begun negotiations with the trade unions with a view to redefining the treatment of linguistic associates on the basis of acquired experience. In other words, the university is on the right track. The Commission is of the opinion that it is obliged, pending the outcome of those negotiations, to find that there has been an infringement of Article 48 of the EC Treaty. In response, the Italian Government argues that the former assistants are already in fact receiving a higher salary than newly-recruited linguistic associates. The fact that negotiations with the trade unions have begun means only that the university intends to resolve these matters formally and definitively.

14. The Oriental University Institute of Naples first concluded employment contracts with former assistants from 1996 onwards but, according to the Commis-

sion, attached a draconian reduction in salary to those contracts. From the documents made available to the Commission, it would appear that their annual pay rose from ITL 12 618 650 to ITL 17 707 830 but at the same time the number of hours they were required to work rose from 114 to 318. The Commission claims that this is a serious infringement. In its defence, the Italian Government points out that, by a decision of 14 July 1999, the governing body of the university adopted an increase in salary on the basis of acquired experience in accordance with Article 51 of the collective agreement for the university sector, and that even before that date a bonus had been awarded on the basis of acquired experience. The Italian Government also disputes the Commission's calculation described above. The United Kingdom Government, on the other hand, annexes to its statement in intervention a number of statements by British nationals, in which they (former foreign-language assistants) claim to have received no salary increase. During the hearing at the Court on 11 January 2001, the actual treatment of former assistants at the Oriental University Institute of Naples was discussed at length. It became clear that the system was a complex one. It also became clear that, although a settlement had been reached which took account of the previous experience of the individuals concerned, that settlement was only put into effect by the abovementioned decision of 14 July 1999.

15. At the University of Palermo, 40 fixed-term employment contracts held by former assistants were converted into employment contracts of indeterminate duration, without any document showing that acquired rights had been recognised. Thirty-eight of the 40 former assistants [5] successfully challenged the level of their pay in the courts, while in 11 further cases temporary contracts were likewise converted into contracts of indeterminate duration. In the Commission's opinion, the Italian Government's assertion that the situation at the University of Palermo is now in order has not been proved at all. In its defence, the Italian Government points out that here too the former foreign-language assistants are more highly paid than the newly-recruited linguistic associates. In its reply, the Commission disputes that factual assertion, referring to the decision of the employment tribunal in Italy.

16. The situation at the University of Pisa is comparable with that at La Basilicate. No account is taken of individuals' acquired experience. In a letter of 17 July 1998 annexed to the letter of 23 April 1999 from the Italian authorities, the rector of the University of Pisa claims that account is taken of the experience acquired by former assistants. In the Commission's view, however, that claim is based on a misunderstanding of the reasoned opinion. The university's collective agreement does not recognise *specific personal* professional

5 — Later documents refer to 39 of the 41 assistants.

experience. In its defence, the Italian Government observes that the former foreign-language assistants received an increase of 30% in their salary from as long ago as 1994 and that that increase was maintained after the entry into force of Law No 236/95.

17. 'La Sapienza' University in Rome does not include in its collective agreement any clause which takes account of the experience of former assistants and to that extent is comparable with La Basilicate and Pisa. The Italian Government acknowledges the lack of such a clause. The Commission takes note of the fact that the University in Rome is preparing to recognise individual experience. Pending that development, the Commission finds that there is an infringement of Article 48 of the EC Treaty. In its defence, the Italian Government points out that the university recognised length of service in its decision of 28 January 1999 and on the basis of that decision introduced a supplementary payment with retrospective effect. In its reply, the Commission disputes the accuracy of that observation since, although the decision of 28 January 1999 does provide for a salary increase for linguistic associates, it takes no account of length of service. That claim is supported by the United Kingdom in its statement in intervention.

General arguments

18. In summary, the Commission concludes that, in their employment contracts with linguistic associates, the abovementioned six universities do not recognise the years of past service completed by those associates as foreign-language assistants. The Commission regards the fact that four of those six universities are now negotiating with the trade unions about the recognition of acquired rights as confirmation of that.

19. In the Commission's opinion, the six universities are thus not acting in accordance with Law No 236/95. Italy is guilty of prohibited discrimination based on nationality against former foreign-language assistants, since the Italian legislation (Law No 230/62) provides, in respect of Italian workers whose employment relationship is governed by private law, for the automatic conversion of a fixed-term employment contract into an employment contract of indeterminate duration *from the date on which the worker was first employed*. I would point out that the employment contracts of linguistic associates are also governed by private law.

20. I give below, in essence, the arguments put forward by the Commission.

21. The Commission's main argument is as follows. The system must result in recognition, for every linguistic associate, of specific personal experience acquired under the old statutory system. In the Commission's opinion, that means effective individual recognition of length of service. The form which such recognition takes is immaterial. In none of the six universities concerned is length of service recognised effectively and individually.

22. The Commission's second argument concerns the manner in which it must be established that the six universities do not recognise length of service effectively on an individual basis. To that end, the Commission cites examples of some universities which have properly recognised length of service. In particular, it points to the solutions adopted by the three universities against which the infringement proceedings were originally also brought, namely Aquila, Venice and Genoa. The collective agreements for those three universities include a clause which recognises acquired rights, either by means of a special salary increase proportionate to the acquired seniority (in Aquila on an annual basis, in Venice on an hourly basis) or by means of a one-off amount, likewise proportionate to the acquired seniority (Genoa).

23. The Commission's third argument concerns the production of evidence. It has produced a number of documents in support of its action and it is for the Italian Government to show that the content of those documents is incorrect.

24. In other respects, the Commission does not attach much importance to the production of evidence. In its opinion, the fact that the former assistants and the newly-recruited linguistic associates receive the same pay, or at least that no account is taken of individual previous experience, is sufficient.

25. The Commission's fourth argument, which is based on breach of the prohibition of discrimination under Article 48 of the EC Treaty, follows, according to the Commission, from the fact that, in the case of Italian workers, as I have already explained above, conversion of a fixed-term employment contract into an indefinite employment contract takes place automatically *from the date on which the worker was first employed* (pursuant to Law No 230/62). The Commission observes in this connection that the conduct of the six universities also constitutes a breach of that law. The former assistants still have to apply to the national courts in order to secure recognition of their rights. The need

to involve the courts in order to ensure equal treatment with Italian workers is in itself contrary to Community law.

26. The Commission's fifth argument is based on irrelevance of the fact that certain universities are now taking action to put an end to the alleged infringement (Milan), or have done so in the meantime (Naples). In its reply, it refers, *inter alia*, to the judgment in *Commission* v *France*,[6] in which the Court states: 'In this connection, it must be observed that it is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion.'[7] The Commission then examines, likewise by reference to settled case-law, its interest in obtaining a judgment from the Court even where an end has been put to the infringement in the meantime: '... according to the Court's settled case-law, the subject-matter of an action under Article 169 of the EC Treaty is determined by the Commission's reasoned opinion and, even where the failure to fulfil obligations has been remedied after the expiry of the period laid down pursuant to the second paragraph of that article, the Commission retains an interest in continuing its action. That interest may lie, *inter alia*, in determining a basis for possible liability of the Member State for its failure to fulfil its obligations towards other Member States, the Community or private persons'. According to the Commission, in this case it is a question of establishing liability towards the former assistants.

27. The Commission's sixth argument concerns the imputability of the breach of obligations to the Italian Government. According to Commission, the Italian Government could have issued a circular on the interpretation of Article 4 of Law No 236/95. Such a circular could have provided for an orderly and uniform transition for the former foreign-language assistants. However, the Italian Government failed to do so and consequently each university implemented that article in its own way.

28. In its defence, the Italian Government emphasises the *de facto* situation at the universities concerned. Either there is in fact (in its rejoinder Italy also uses the term 'substantially') no disadvantage to the former assistants or in any event the Commission has failed to adduce sufficient proof of such disadvantage, or else the universities are in the process of remedying that disadvantage. The complaints against Italy are therefore of a purely technical nature.

29. The Italian Government contends that there is no intention on the part of the

6 — Case C-166/97 [1999] ECR I-1719, paragraph 18.

7 — The Court for its part refers in this connection to, *inter alia*, Case C-60/96 *Commission* v *France* [1997] ECR I-3827, paragraph 15, and Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraph 36.

universities to discriminate against the former assistants vis-à- vis other workers. Proper implementation takes time, in view of, among other factors, the potential for conflict in labour relations with the former assistants.

30. Quite apart from the intentions of the universities, there is also in fact no discrimination, since it has been shown that the former assistants receive a higher level of pay than the newly-recruited linguistic associates.

31. The Italian Government then challenges the use by the Commission of Law No 230/62 as the basis for comparison with national workers. That law is not comparable with Law No 236/95. Whereas Law No 230/62 provides for automatic conversion of fixed-term contracts, Law No 236/95 does not. Former assistants are in fact eligible for posts as linguistic associates only if they pass a selection test.

32. The Italian Government also draws attention to the financial and legal autonomy of the Italian universities. The recognition of acquired rights is a typical contractual issue which arises within the relationship between the university and the former assistant. Such an issue cannot be resolved unilaterally by a public authority. Moreover, the Italian Government considers that the Commission exceeded its powers by formulating proposals for resolving the issue. The making of such proposals does not lie within the Commission's power, but is part of the sovereignty of the national legislature.

33. The United Kingdom Government supports the Commission's view. In particular, it points out that the requirement to take account of professional experience implies that the totality of that experience must be taken into consideration. It disputes the claim that the infringement of Article 48 of the EC Treaty is of a purely technical nature. It still receives complaints from British nationals about the treatment of former assistants in Italy.

The earlier cases concerning foreign-language assistants in Italy

34. The Court has already given rulings in three earlier cases concerning the status of foreign-language assistants in Italy. Those are, first of all, the judgments in *Allué I and Allué II*, which are mentioned in point 2 above. As a result of those cases, Italy

adapted its national legislation. The third judgment is that in *Petrie*.[8] I shall discuss those judgments here in so far as they have a bearing on the outcome of the present case.

35. The judgment in *Allué I* concerned the duration of the employment relationship between universities and foreign-language assistants. That duration was limited to one year, with possible extension for a maximum of five years, whereas in principle no such limit applied to other comparable workers. The Court compared the foreign-language assistants with lecturers engaged under contract, who also performed teaching duties without having passed a competition.

36. The Court regarded that limitation as a form of discrimination based on nationality, on the basis of the following reasoning. Although the limit on the duration of the employment relationship applied irrespective of the nationality of the worker concerned, the workers affected were principally nationals of other Member States. In fact, only 25% of foreign-language assistants were Italian nationals.[9] The grounds put forward by the Italian Government to justify the limit on the duration of the employment relationship were not accepted by the Court.

37. The judgment in *Allué II* represents a clarification of the judgment in *Allué I*. The operative part reads as follows: '[i]t is contrary to Article 48(2) of the EEC Treaty for the legislation of a Member State to limit the duration of employment contracts of foreign-language assistants in any event to one year, with the possibility of renewal, where in principle no such limit exists with regard to other teachers'. In my opinion, the added value of that judgment lies in the fact that the Court no longer bases its analysis on a specific reference group (lecturers engaged under contract) but compares the assistants with other teaching staff in general.

38. In addition, the Court held that, in order to ensure the proper management of their universities, Member States may adopt measures which are applicable without distinction and which could affect, in particular, the nationals of other Member States. Such measures may even involve a limit on the duration of the employment relationship. However, such measures must respect the principle of proportionality. The limited duration of the employment contract in that case did not respect that principle. There was normally a continuous need for foreign-language teaching. In such circumstances it was not proportionate to engage foreign-language assistants for a fixed term on a systematic basis. If the situation changed with regard to a particular language and there was no longer a need

8 — Case C-90/96 *Petrie and Others* [1997] ECR I-6527.

9 — This percentage is also used as a basis throughout the later proceedings. Since it is not disputed, I also adopt it as a starting point for my conclusion.

for teachers of that language at a particular time, there were other ways of getting rid of surplus foreign-language assistants. For example, the surplus assistants could be dismissed in order to adjust staff numbers to the new conditions. Such a measure would, according to the Court, be less restrictive of freedom of movement for workers than the measure at issue in that case.

39. The judgment in *Petrie* concerned an Italian rule governing eligibility for appointment to fill paid temporary vacancies to teach supplementary courses at universities. In its judgment, the Court compared the foreign-language assistants in the first place with tenured teaching staff and established researchers, who were admitted to teaching by way of an open competition. In the case of established researchers, their academic and teaching skills were also evaluated. Those two categories of teaching staff could fill temporary vacancies, whereas foreign-language assistants were excluded from so doing. The Court subsequently reasoned in that case that the foreign-language assistants were not in the same situation as the other two categories of teaching staff, and therefore could not be compared with them. The main thrust of that reasoning was that the universities were reasonably entitled to make participation in an open competition a condition for filling a temporary vacancy, that foreign language assistants had not participated in such a competition and that it would be inappropriate ('contrary to the requirements of sound university management') to oblige them to participate in such competitions (specifically) for temporary vacancies. The Court added that the national rule would certainly be discriminatory if the temporary post were open to other categories of staff who, like the foreign-language assistants, had not participated in a competition.

Freedom of movement for workers

40. Before examining the legal merits of the case itself, I shall briefly consider some further case-law of the Court in the field of freedom of movement for workers, which is relevant to this case. In particular, I want to consider how, with regard to covert forms of discrimination, effect is given to the second paragraph of Article 48 of the EC Treaty, which provides as follows: '[s]uch freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

41. The Court has already interpreted the concept of discrimination, as set out in Article 48 of the EC Treaty, on numerous occasions. The Court has held in this regard that the general prohibition of discrimination based on nationality laid down in Article 6 of the EC Treaty (now, after amendment, Article 12 EC), is elaborated more specifically in relation to the particular fields covered by that treaty. The

prohibition of discrimination based on nationality must be interpreted widely. It is settled case-law that Article 48 prohibits not only overt discrimination based on nationality, but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result.

42. In its judgment in *O'Flynn*, [10] the Court gave a summary of its case-law on covert or indirect discrimination against workers based on nationality. I reproduce that summary here:

'17. The Court has consistently held that the equal treatment rule laid down in Article 48 of the Treaty and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result ... .

18. Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers ... , where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers ... or where there is a risk that they may operate to the particular detriment of migrant workers ... .

19. It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law ... .

20. It follows from all the foregoing case-law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.

21. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such

10 — Case C-237/94 *O'Flynn* v *Adjudication Officer* [1996] ECR I-2617.

an effect. Further, the reasons why a migrant worker chooses to make use of his freedom of movement within the Community are not to be taken into account in assessing whether a national provision is discriminatory. The possibility of exercising so fundamental a freedom as the freedom of movement of persons cannot be limited by such considerations, which are purely subjective.' [11]

43. In the recent judgment in *Österreichischer Gewerkschaftsbund*, [12] as in the present case, the issue was the failure to take into account seniority when determining the pay of contractual teaching staff. The Austrian national legislation at issue in that case made the taking into account of periods of employment in other Member States subject to stricter requirements than those applicable to the taking into account of periods of employment in Austria itself. The Court held that such a national rule was contrary to, *inter alia*, Article 48 of the EC Treaty. That case followed earlier cases in which the failure to take into account periods of employment in other Member States had been regarded as indirect discrimination. [13] For the sake of completeness, it should be pointed out that that judgment again confirmed the Court's settled case-law that the exception laid down in Article 48(4) for employment in the public service does not apply to teachers.

11 — The judgment cited contains references to a series of earlier decisions which form the basis of the summary reproduced here.

12 — Case C-195/98 *Österreichischer Gewerkschaftsbund* v *Austria* [2000] ECR I-10497.

13 — Case C-419/92 *Scholz* [1994] ECR I-505, Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47 and Case C-187/96 *Commission* v *Greece* [1998] ECR I-1095.

Assessment of the dispute

Substance

44. In my opinion, the main issue in these proceedings is whether Italy has complied satisfactorily with the judgments in *Allué I* and *Allué II*, in which the Court held that the method of appointment of foreign-language assistants involved covert discrimination based on nationality, which is prohibited under Article 48 of the EC Treaty. The starting point for the Court in that connection was the fact that those foreign-language assistants were predominantly nationals of Member States other than Italy.

45. In order to comply with those judgments, Italy adopted the abovementioned Law of 21 June 1995 (Law No 236/95). I assume that Law No 236/95 in itself satisfies the requirements of Community law. That law itself is not at issue in this case. The matters at issue in this case are the

manner in which that law is implemented and the extent to which the administrative practice in Italy is consistent with the content and purpose of that law. It is self-evident that the autonomy of the universities in the appointment of linguistic associates renders that administrative practice rather complex, both legally and in practice. It will be recalled that the legal status of linguistic associates is governed not only by the abovementioned law but also by various contractual instruments (see point 5 of this Opinion).

46. I attach no decisive importance to the difficulties entailed by complex and decentralised implementation. It is for the Court to examine whether the Italian Government is entitled to maintain that an end has been put to the breach of Community law consisting of discrimination against (former) foreign-language assistants, which was first established by the Court as long ago as 30 May 1989 in the judgment in *Allué I*. I am of the opinion — partly because of the number of years which has elapsed since the judgment in *Allué I* — that the Italian Government can be expected to have completely eliminated the discrimination established on that earlier occasion. It is not sufficient for the Italian Government to show that it is now on the right track. In other words, what is at issue here is the result achieved, not the effort made.

47. It is obvious that equal treatment for former foreign-language assistants does not mean only that they should obtain employment for an indeterminate period, which was the central issue in *Allué I* and *Allué II*, but also that such employment should conform to the normal principles of Italian employment law. The taking into account of acquired experience is such a principle, as is clear, *inter alia*, from Law 230/62 and also from Article 4(3) of Law No 236/95. The Commission, too, is of the opinion that the result of any system must be the recognition of each linguistic associate's specific personal acquired experience. The Italian Government does not contradict that in principle. For the sake of completeness, I would add that the national laws of other Member States also provide, as a principle of employment law, for account to be taken of personal previous experience. I refer in this regard to the various judgments of the Court, and most recently to that in *Österreichischer Gewerkschaftsbund*, which have dealt specifically with the taking into account of personal previous experience.

48. The form which such recognition takes does not seem to me to be important. There must certainly be a relationship between pay and acquired experience. It cannot of course be the case that a person with one year's work experience is paid the same as someone with 20 years' work experience. The question in these proceedings, the subject-matter of which is a possible breach of Article 48 of the EC Treaty, is whether an important principle of employment law, which applies to Italian workers, is also applied to former assistants. Since I consider equal treatment to be a central to employment law, I find it irrelevant whe-

ther Law No 230/62 or Law No 236/95 is adopted as the point of reference.

49. The Court will now have to establish whether the universities concerned take (sufficient) account of the previous experience of the former foreign-language assistants. The information provided by the Commission appears to show that previous experience is not taken into account in all cases. At some of the universities concerned, former assistants and newly-recruited linguistic associates receive the same pay, and in none of those universities is account taken of individual previous experience.

50. In such a case, there is a clear Treaty infringement if the Italian Government fails to show that, contrary to what the Commission claims, previous experience is in fact taken into account. Certainly, where, as in this case, the issue is one of compliance with existing Court judgments, it is for the Member State to show that its conduct is now in conformity with the Treaty.

Application

51. Italian universities have a large degree of autonomy in the appointment of linguistic associates. That autonomy presents a varied picture. Each university itself determines whether and how it will take account of the previous experience of linguistic associates. Such autonomy in itself reinforces the suspicion that the result required by Community law, namely, that account is taken of individual previous experience, is not achieved in all cases.

52. That is also the real point at issue between the parties, as again became clear at the hearing. In principle, the Italian Government does not deny that account must be taken of individual previous experience, but challenges the Commission's factual assessment that the six universities are in practice failing in this respect. The Italian Government also disagrees with the use by the Commission of Law No 230/62 as a point of reference.

53. There are various conceivable ways in which personal previous experience could be taken into account. The Commission cites some examples in its application to the Court (Aquila, Venice, Genoa). In my opinion, it is not necessary to discuss each of those examples in turn in the context of these proceedings. What matters is the result to be achieved, namely, that individual previous experience is taken into account in the employment contracts with former assistants. Taking as a basis the information provided by the parties, I

would characterise the situation at the six universities as follows:

— At the Universities of La Basilicate, Pisa and Rome, no account is taken of the previous experience of former assistants. Former assistants receive the same pay as newly-recruited linguistic associates. The Italian Government does not dispute that. I attach no importance in this regard to the fact that the former assistants (and thus also the newly-recruited linguistic associates) receive a level of pay which is higher than the basic remuneration provided for in the collective agreement for the university sector.

— In the cases of the Universities of Milan and Palermo, the parties disagree on whether account is taken of previous experience. In my opinion, the Italian Government has not shown that account is in fact taken of previous experience. Its contention to that effect is not supported by the documents. In the case of Palermo, that contention also seems to conflict with the proceedings before the Italian employment tribunal, in which 38 former assistants successfully challenged the level of their pay. Furthermore, it has certainly not been shown that account has been taken of the former assistants' *personal* experience.

— The situation at the Oriental University Institute of Naples is complex and it is not clear how the pay of former assistants has developed, particularly in relation to the number of hours worked. It is significant to me that it became clear at the hearing that, in so far as rules taking account of personal previous experience have come into effect, those rules were only adopted on 14 July 1999. That date is later than the date on which the Commission delivered its reasoned opinion, namely, 28 January 1999.

54. In summary, I conclude that the Italian Government has failed to show that, at those six universities, account is taken of the former assistants' individual previous experience. That being the case, the Italian Government cannot guarantee that an end has been put to the breach of Community law consisting of discrimination against the (former) foreign-language assistants, which was first established by the Court as long ago as 30 May 1989 in the judgment in *Allué I*. There are no possible grounds of justification.

55. I therefore propose that the Court find, in connection with the administrative and contractual practice which certain public universities have introduced, that the Italian Republic has failed to fulfil its obligations under Article 48 of the EC Treaty.

In the alternative

56. I am of the opinion that I have sufficiently examined in the foregoing the Commission's first three arguments which, as should be clear, I essentially support. I do not consider it necessary in this context to examine at length the requirements which the Commission specifies with regard to taking into account length of service. In the alternative, should the Court not agree, or only partly agree, with my line of argument, I shall still examine the remaining arguments which the Commission has put forward in these proceedings, as well as, where necessary, the Italian Government's defence.

57. The Commission's fourth argument concerns the comparison of the former assistants with workers whose employment relationship is governed by private law, and in particular with the rights arising from Law No 230/62. The question is now whether the Commission has made the correct comparison. That question breaks down into a number of sub-questions:

(a) Is it correct to compare the former assistants with Italian workers in general, or must a more specific reference group be used? It should be borne in mind that, in the three earlier cases before the Court concerning former assistants, the latter were always compared with specific categories of teaching staff.

(b) Can the rights arising from Law No 230/62 properly be compared with those arising from Law No 236/95, since the former assistants are eligible for appointment as linguistic associates only if they pass a selection test and there is thus no question of automatic conversion of an employment contract?

(c) Does it follow from Law No 230/62 that account must actually be taken of Italian workers' individual previous experience, or could a broader recognition of length of service suffice?

(d) Are the former foreign-language assistants not likewise entitled to rely on Law No 230/62 if no account is taken of their individual previous experience?

(e) If the answer to sub-question (d) is in the affirmative, is there any objection to the former assistants having to apply to the national courts in order to enforce their rights, having regard to the fact that their rights (also) arise from Community law?

58. Sub-question (a): the Commission uses as a reference group Italian workers whose employment relationship is governed by private law. The former foreign-language assistants must be treated equally with Italian workers. In addition, the Commission makes a second comparison: it compares the former foreign-language assistants with newly-recruited linguistic associates: since the previous experience of the former foreign-language assistants differs from that of newly-recruited linguistic associates, they must also be treated differently. I find it remarkable that the Commission does not compare the former foreign-language assistants with other categories of university staff who have comparable previous experience. An infringement of Article 48 of the EC Treaty could easily be established if the Commission had shown that proper account is taken of the individual previous experience of comparable categories of university staff consisting predominantly of Italian nationals. The Court's three earlier judgments concerning foreign-language assistants in Italy provide sufficient reference points for such an approach.

59. However, I do also find the comparison of the former foreign-language assistants with Italian workers in general sufficiently specific in this case to establish covert discrimination as referred to in Article 48 of the EC Treaty. According to the Court's case-law, [14] there may be discrimination if it is apparent that rights arising from a general law do not apply to a specific group of workers consisting predominantly of nationals of another Member State.

60. Sub-question (b): the Commission bases its application on Law No 230/62 which provides that, for Italian workers, a fixed-term employment contract is automatically converted into an employment contract of indeterminate duration *from the date on which the worker was first employed*, which contrast with the six universities' implementation of Law No 236/95. The Italian Government disputes the relevance of the comparison since, in the case of the former assistants, there is no question of automatic conversion of the employment contract. I cannot agree with the Italian Government's argument on this point. Although they relate to different situations, both laws have a similar objective: they are intended to ensure that an employment contract takes account of the worker's previous experience. Moreover, they not only have the same objective, but also the same effect, namely, that account is actually taken of such previous experience. In the case of Article 4(3) of Law No 236/95, its effectiveness is certainly subject to its correct implementation by the universities.

61. Sub-question (c): this sub-question concerns the content of Law No 230/62. It is simply whether the precise interpretation which the Commission gives to that content, namely, that account must be taken of the worker's *individual* previous experi-

14 — Among others, the judgment in *O'Flynn* (cited in footnote 10).

ence, follows from the wording of the law itself. However, this is a question concerning the interpretation of a national law, which the Court is not required to address. In my opinion, it is sufficient, in order to establish discrimination within the meaning of Article 48 of the EC Treaty, that Law No 230/62 gives rise to a principle of employment law which is not (in all cases) applied to the former assistants.

62. Sub-questions (d) and (e): It is apparent from the documents that — at the University of Palermo in any event — a number of former assistants have successfully applied to the national courts. The Commission takes the view that the need to resort to the courts in order to ensure equal treatment with Italian workers is in itself incompatible with Community law. Whatever the merits of that view may be in general, the issue in the present case is one of compliance with a Court judgment giving rise to the obligation for Italy as a Member State to put an end to the breach of Community law consisting of discrimination against (former) foreign-language assistants. I am of the opinion that in such circumstances the Member State has failed to fulfil its obligation if each assistant has to apply individually to the national courts in order to eliminate this persistent discrimination.

63. I now come to the Commission's fifth argument. The Commission cites the Court's case-law which indicates that a breach of Community law in proceedings such as these must be assessed according to the situation at the end of the period laid down in the reasoned opinion. I am of the opinion that the Commission has thus made it sufficiently clear why it is not required to take any account of the changes in Italian administrative practice which occurred subsequently. It is beyond dispute that the former assistants have an interest in obtaining a Court judgment in order to be able to bring a legal action against the Italian Government or the universities concerned. I would reiterate, moreover, that the decisive factor for the purpose of establishing an infringement of Community law is the result, and not the efforts made by Italy.

64. The Commission's sixth argument concerns the culpability of the Italian Government's conduct in failing to issue a circular on the interpretation of Article 4(3) of Law No 236/95. In my opinion, since the result is decisive in this case, the culpability or otherwise of Italy's conduct is first and foremost irrelevant I would add for the record that, in my view, it would have been reasonable, particularly in the light of the background to this case, namely, the judgments in *Allué I* and *Allué II*, for the Italian Government to have made every effort to end the discrimination against the former assistants. In that respect, a circular on the interpretation of the new legislation would certainly have been appropriate.

Conclusion

In the light of the above facts and circumstances, I propose that the Court:

(a) declare that, in connection with the administrative and contractual practice applied by certain public universities when re-engaging former foreign-language assistants as linguistic associates, whereby the rights which the latter have acquired individually by virtue of their previous employment are not or not sufficiently recognised, whereas in general such recognition is guaranteed for other national workers, the Italian Government has failed to fulfil its obligations under Article 48 of the EC Treaty (now, after amendment, Article 39 EC);

(b) pursuant to Article 69(2) of the Rules of Procedure, order the Italian Government to pay the costs.